

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J, 'MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 1000 to 1003 & 1005/MUM/2013
(Asst. Year : 2005-06 to 2007-08 & 2010-11)**

AND

**ITA Nos. 924 & 928/MUM/2015
(Asst. Year : 2004-05 & 2009-10)**

Shri Jayesh K. Samat,
Block-H, Shri Sadashiv CHS Ltd.,
6th Road, Santacruz (E),
Mumbai – 55.

Vs. DCIT, Cental Circle-46,
Mumbai - 20

PAN No. AAGPS 2942 B
(Appellant)

(Respondent)

Assessee by : Shri M.M. Choksi – CA.
Department By : Shri Alok Johri - DR
Date of hearing : 19/10/2016.
Date of pronouncement : 28/10/2016.

ORDER

PER BENCH

All these appeals are filed by the assessee against the common order of Commissioner of Income Tax (Appeals), for the Assessment Years 2005-06 to 2008-09 & 2010-11 In sustaining the addition in estimating the Commission income and appeals for the Assessment Years 2004-05 & 2009-10 in sustaining the penalty levied u/s. 271(1)(c) of the Act.

2. The assessee has raised various grounds including the ground agitating that order passed by the Assessing Officer is without providing sufficient opportunity of hearing to the assessee. On merits, the assessee challenged the order of the Ld. CIT(A) in confirming the additions made by the Assessing Officer at 2% on gross deposits as against 0.15 offered by the assessee. At the time of hearing, the Ld. Counsel for the assessee submits that the Assessing Officer passed assessment orders in all these assessment years without giving sufficient opportunity to the assessee. The Ld. Counsel for the assessee submits that in identical additions were made completing the assessments as many as 70 cases on a single day on 8.12.2011 without giving adequate opportunity.

3. The Ld. Departmental Representative however submits that in the course of assessment proceedings, assessee has filed written submissions, furnished evidences, therefore it is not correct to say that no proper opportunity was given to the assessee.

4. Coming to the merits of the case i.e. addition made at 2% of gross deposits as against 0.15% offered by the assessee, the Ld. Counsel for the assessee submits that on identical facts, the Co-ordinate Bench has decided this issue holding that income by way of commission from the business of accommodation entries being carried out by Mukesh Chokshi group was liable to be assessed at 0.15% instead of 2% applied by the Assessing Officer. The Ld. Counsel for the assessee relied on the following decisions:

Sl. No.	ITA Nos.	Name of the assessee	Date of order
1.	ITA Nos. 19 to 22/M/2013	M/s. Kaycee Shares Broking Pvt. Ltd.	09.09.2016
2.	ITA Nos. 6435 to 6441/M/2012	M/s. Mihir Agencies Pvt. Ltd.	06.01.2016

3.	ITA Nos. 309 & 310/M/2013	M/s. Kanak Stock Brokers Pvt. Ltd.	09.09. 2016
4.	ITA Nos. 887/M/12 & 2699/M/13	M/s. Goldstar Finvest Pvt. Ltd.	30/11/2015
5.	ITA Nos. 2700, 2702 & 2701/M/13	Alliance Intermediateries & Network Pvt. Ltd	24/2/2016
6.	ITA Nos. 6114 to 6120/M/12	M/s. Goldstar Finvest Pvt. Ltd.	1.6.2016
7.	ITA Nos. 6558 to 6564/M/12	M/s. Alpha Chemie Trade Agencies Pvt. Ltd	09.09.16
8.	ITA Nos. 833 to 839/M/13	Mr. Mukesh Choksi	4.5.2016

5. The Ld. Departmental Representative vehemently submits that all the decisions relied on by the Ld. Counsel for the assessee are rendered on the facts of that particular case and the facts in the present assessee's case are not similar. Therefore he submits that those decisions may not be applicable and should not be followed. The Ld. Departmental Representative before us submitted written submissions running into 17 pages explaining the ratio of all those decisions and bringing out the distinguishing features according to him and submitted that since the decisions are not applicable, the same may not be followed.

6. We have heard the rival submissions, perused the orders of the authorities below. The Ld. Counsel for the assessee submitted that no proper opportunity was given and hence assessments should be set aside to the Assessing Officer for fresh adjudication and he further submitted that the issue in appeal is squarely covered by various decisions of the Co-ordinate benches wherein it was held that the commission income from the business of accommodation entries should be assessed at 0.15% as against 2% assessed by the Assessing Officer.

Taking note of all the decisions and submissions of the Ld. Departmental Representative, we are of the view that the Assessing Officer should examine all these submissions of the Ld. Departmental Representative and the case laws relied on by the Ld. Counsel for the assessee and decide the issue afresh in accordance with law. Thus, we restore the assessments to the file of the Assessing Officer to decide afresh in accordance with law after providing adequate opportunity of being heard.

7. In the result, the appeals filed by the assessee for the Assessment Years 2005-06 to 2007-08 and 2010-11 are allowed for statistical purpose.

ITA Nos. 924 & 928/M/2015 – A.Yrs 2004-05 & 2009-10

8. These two appeals are filed by the assessee against the orders of the Ld. CIT(A)-38, Mumbai dated 14.11.2014 in confirming the penalty levied u/s. 271(1)(c) of the Act on the income assessed by the Assessing Officer on estimating the commission in providing accommodation entries by assessee.

9. The Ld. Counsel for the assessee submits that on identical circumstances penalty is deleted in the case of Alpha Chemie Trade Agencies Pvt. Ltd. by the Co-ordinate Bench of the Tribunal in ITA No. 698 & 709/M/2015. The Ld. Counsel for the assessee submits that the order of the Ld. CIT(A) is common in the case of Alpha Chemie Trade Agencies Pvt. Ltd. and also the present assessee viz., Jayesh K. Sampat. Since facts and circumstances being identical, the same may be followed.

10. The Ld. Departmental Representative placed reliance on the order of the assessment order.

11. We have heard the rival submissions and perused the orders of the authorities below. We find that on identical situation where the commission was assessed in providing accommodation entries at 0.15% as against 2% assessed by the Assessing Officer, the penalties were deleted by the Co-ordinate Bench observing as under:

4. We have heard rival submissions, perused the orders of the authorities below and the case-laws before us. Admittedly, the assessee provided accommodation entries in this case. The backdrop of the dispute is that search and seizure under section 132(1) was conducted in the case of several companies, whose kingpin is identified as one Mr. Mukesh Choksi. It was found in the course of search that such entities were providing accommodation entries by way of share trading/loans etc. As the assessee herein also was covered in the search, assessments under section 143(3) read with section 153C of the Act were made for Assessment Years 2004-05 & 2008-09, wherein additions were made. Such assessment of income has been further affirmed by the Id. CIT(A).

5. *During the course of search proceedings, the Revenue had noted that for providing accommodation entries, the entries like the assessee, which were controlled by Mr. Mukesh Choksi were earning commission income. In view of such modus operandi noted and the statements of Mr. Mukesh Choksi recorded at the time of search, the Assessing Officer notes that the group was earning commission ranging from 1.5% to 3.5% and accordingly he estimated the net commission income @ 2%. Accordingly, based on the total receipts reflected in the bank account, the Assessing Officer estimated the commission income @ 2%. This action of the Assessing Officer has since been upheld by the Id. CIT(A).*

6. *The assessee preferred appeal before the I.T.A.T. and the coordinate Bench of this Tribunal in quantum proceedings in ITA No. 6559 & 6563/MUM/2012 by following various decisions in similar facts, directed the Assessing Officer to re-compute the commission income at 0.15% instead of 2% applied by the Assessing Officer. The Assessing Officer levied penalty for the addition made on account of commission income. The matter was carried out to the Id. CIT(A), who sustained the penalty by following the cases where similar additions were made and in the cases of Goldstar Finvest Pvt. Ltd., M/s. Kaycee Shares Broking Pvt. Ltd., M/s. Mihir Agencies Pvt. Ltd. and finally the assessee for the Assessment Year 2009-10 & 2010-11. We have also*

perused the coordinate Bench decisions in the case of Goldstar Finvest Pvt. Ltd., M/s. Kaycee Shares Broking Pvt. Ltd., M/s. Mihir Agencies Pvt. Ltd., wherein the coordinate Bench deleted the penalty levied under section 271(1)(c) of the Act. In an identical facts and circumstances in the case of M/s. Kaycee Shares Broking Pvt. Ltd., the coordinate Bench deleted the penalty by following the decision in the case of M/s. Mihir Agencies Pvt. Ltd. The operative portion of the order is reproduced herein under:-

“4. In the above background, Ld. Representative for the assessee pointed out that similar situation has been dealt with by the Tribunal in the case of Mihir Agencies Pvt. Ltd., & Mr. Mukesh Choksi (supra), wherein the penalty levied under section 271(1)(c) of the Act has been deleted. Ld. Representative for the assessee pointed out that the Tribunal has duly noted that the difference between the assessee and the Revenue was primarily on the estimation of income earned from providing of accommodation entries and, therefore, the same would not be exigible for penalty under section 271(1)(c) of the Act. In this context, he has referred to the following discussion in the order of the Tribunal dated 27/07/2016 (supra):-

“6. We have heard the rival submissions and produce the material before us. We find that case under consideration an action u/s .132 of the Act was carried out covering all the group entities including the assessee under consideration, that it was found group concerns were engaged in providing accommodation bills/hawala entries, that the assessee did not dispute the said fact, that the AO estimated the income from the accommodation entries @ 2% of the total transactions appearing in the bank accounts of the assessee, that the then FAA confirmed the quantum addition made by the AO, that in the case under consideration the Tribunal had held that commission income should be taken at the rate of 0.15% (ITA /6435/Mum/2012 – AY-2004-05 and other six appeals dt.6.1.16). The undisputed fact is that there is difference of opinion as to how much income should be estimated for the hawala entries-the AO estimated at a particular percentage, whereas the assessee had shown the income at a different percent. The addition made by the AO and confirmed by the FAA in quantum addition may or may not be. But, levying penalty on the basis of an estimated addition could not be held to

be justified. No authority is required to be cited that penalty and assessment proceedings are separate and distinct proceedings and the quantum proceedings should not result in automatic levy of concealment penalty. It is a case of estimation of income by the AO and the assessee.

Here we would like to discuss two cases. One of them is Aero Traders P. LTD.(322 ITR 316).In that case the assessee-company had filed its return of income for the year 1997-98 on a notice u/s.148 of the Act, 1961 declaring a loss of Rs. 83, 64, 468/-.The assessee had, in the return attached a note stating that it was impossible for it to substantiate its claim of loss by way of any evidence as the relevant records were seized and were with the police authorities. The AO after being unable to obtain copies of the seized documents, based his assessment order on the limited documents provided and rejected the book results declared by the assessee. He estimated the income of the assessee at Rs.61,00,000/-.He also initiated penalty proceedings separately. The FAA estimated the total income of the assessee at Rs.1,02,980/-.The Tribunal confirmed this order. The AO observed that the profit was estimated after rejection of books of account due to certain discrepancies and imposed a penalty on the assessee of Rs. 36,41,003/-, on the ground that it was a clear case of furnishing inaccurate particulars of income. The FAA deleted the penalty holding that the addition made by the AO on the basis of estimated profit could not be a subject-matter of penalty for concealment of income. The Tribunal confirmed this order. On appeal, the AO dismissed the appeal and held that the finding arrived at by the Tribunal did not warrant interference as it was purely a finding of fact. In the case of Durga Kamal Rice Mills(265 ITR 25)the Hon'ble Calcutta High Court has held as under:

“When two views are possible and when no clear and definite inference can be drawn, in a penalty proceeding, penalty cannot be imposed.....In quantum proceedings, a particular provision might be attracted for addition to the income of the assessee. But when it comes to the question of imposition of penalty, then independent of the finding arrived at in the quantum proceedings, the authority has to find conclusively that the assessee owns the concealed amount.”

Considering the fact that Tribunal has adopted a particular rate for estimating the income of the assessee for the year under consideration, we hold that the FAA was not justified in confirming the order passed by

the AO u/s. 271(1)(c) of the Act. Therefore, reversing his order, we decide the effective ground of appeal in favour of the assessee.”

5. The Ld. Departmental Representative has not disputed the factual matrix brought out by the Ld. Representative for the assessee, though he has defended the levy of penalty under section 271(1)(c) of the Act.

6. We have carefully considered the rival submissions. It is abundantly clear that modus operandi and the nature of income earned by the assessee, which has been subjected to the penal provisions of section 271(1)(c) of the Act in the instant case, are similar to those considered by the Co-ordinate Bench in the case of Mihir Agencies Pvt. Ltd., & Mr. Mukesh Choksi (supra). It is also abundantly clear that in the present case also the variation in the quantum of income assessable between assessee and the Revenue is on account of estimation only, an identical situation which has been considered in the aforesaid precedents. Therefore, following the aforesaid precedents, which have been rendered in similar circumstances, we hereby set-aside the order of the CIT(A) and direct the Assessing Officer to delete the penalty imposed under section 271(1)(c) of the Act. Thus on this aspect, assessee succeeds.”

7. Respectfully following the aforesaid decision, we delete the penalty levied under section 271(1)(c) in these cases, as the facts and circumstances being identical, as the commission income assessable in the hands of the assessee has been on estimate basis, no penalty is attracted on the additions/disallowances made on estimate basis.

Respectfully following the said order, we delete the penalty levied u/s. 271(1)(c) of the Act in these cases also.

12. In the result, the appeals filed by the assessee for Assessment Years 2005-06 to 2007-08 and 2010-11 are allowed for statistical purposes and the appeals for the Assessment Years 2004-05 and 2009-10 are allowed.

Order Pronounced in the open Court on 28th October, 2016

Sd/-
(N.K. PRADHAN)
Accountant Member

Sd/-
(C.N. PRASAD)
Judicial Member

Dated : 28th Oct., 2016.

Rj/-

Copy to:

1. *The Assessee.*
2. *The Revenue.*
3. *The CIT*
4. *The CIT(A)*
5. *The D.R.*
6. *Guard file.*

By order

//True Copy//

Assistant Registrar
I.T.A.T., Mumbai